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## Minimums of Judicial Standards

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## Minimums of Judicial Standards

JULIUS J. WUERTHNER\*

The keystone of Democracy and our way of life is our judicial system. It is the "strong fortress." Should it become so impaired that people no longer have faith or confidence in the courts and the administration of justice, then we can well say with Phinehas' wife, "The glory is departed from Israel; for the ark of God is taken."<sup>1</sup> There is unrest and dissatisfaction with our archaic methods of dispensing justice.

It therefore behooves Bench and Bar to remedy "ancient wrongs" and to set our house in order, lest bewitching sirens of other worlds and false ideologies engulf us to destroy that which our founding fathers wrought through travail, sacrifice, suffering, and "blood and tears." We cannot be *indifferent* to the incessant demands of the people for judicial reform. The jurists and lawyers must no longer be apathetic to these demands, and the suitor seeking to enforce his substantive rights shall not be denied those rights. Our out-moded, technical, and highly refined procedures occasion interminable delays that we should no longer continue to tolerate. The anachronisms which defeat the enforcement of these legal rights and cause unrest and disrespect for the machinery of justice should be abolished. The power to do this was characterized by a former president of the American Bar Association as "the most important single instrument of democracy."<sup>2</sup> We must therefore strengthen, maintain, and preserve that "instrument," and it will require the thought, effort, and even prayers of every lover of democracy, be he

\*Prominent Great Falls attorney, State Delegate to the House of Delegates of A.B.A., former president of the Montana Bar Association, and former member to the Montana Senate and Montana House of Representatives.

<sup>1</sup>1 Samuel 4-22.

<sup>2</sup>Jacob Mark Lashley, St. Louis Post-Dispatch, Nov. 5, 1950.

lawyer or layman. We must become aroused and follow the Biblical injunction to "get thee up into the high mountain and . . . lift up thy voice with strength,"<sup>3</sup> and become flaming evangelists to improve our system of judicature. We should constantly strive to maintain our institutions of justice if we would avoid what is taking place in those unfortunate countries under the yoke of the Kremlin and its one-sided administration of Justice. Of our three branches of government, none is more important to the preservation of our way of life than the judiciary. Let us strengthen and preserve it by all the national instruments within our power and control.

John Adams, second President of the United States, graphically warns us that "there never was a democracy in all history which did not commit suicide."<sup>4</sup> Sixteen out of the twenty-six civilizations, each differing from each other, which have existed in the world are now "dead and buried."<sup>5</sup> These facts give food for thought.

During "another critical period" of our national history the immortal Lincoln said:

"At what point then is the approach of danger to be expected? I answer if it ever reach us it must spring up amongst us; it cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of free men, we must live through all time or die by suicide."

Another eminent lawyer, Charles Evans Hughes, once said:<sup>6</sup>

"You cannot maintain democratic institutions by mere forms of words or by occasional patriotic vows. You maintain them by making the institutions of our Republic work as they are intended to work."

We shall make "the most important single instrument of democracy" work.<sup>7</sup>

General apathy and phlegmatism impede judicial improvement and must be shed by all for the steeled armor of aggressive endeavor and firm-hearted determination to accomplish needed reforms. In that program every jurist, lawyer, and citizen should have his part. Let all take up the cross, if cross it be!

The movement for judicial reform is comparatively recent. It has been "jelling" only in about the past fourteen years.

<sup>3</sup>Isaiah 40-9.

<sup>4</sup>New Age, Dec. 1950.

<sup>5</sup>Toynbee, *A Study of History* (1947).

<sup>6</sup>*The Improvement of the Administration of Justice* (Handbook) p. 3.

<sup>7</sup>*Supra*, note 2.

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The germ however has been of longer standing among those who have observed "with alarm" the inadequacies of our judicial system, its interminable delays, refined technicalities of pleading and procedure, and the denial of substantive rights which procedural difficulties and anachronisms propagate and maintain. This has, and is causing popular unrest and dissatisfaction with our courts.

In this article frequent reference will be made to *Minimum Standards of Judicial Administration*, which is a "survey of the extent to which the standards of the American Bar Association for the improving the administration of justice have been accepted throughout the country," and which was edited by Hon. Arthur T. Vanderbilt, whom we shall ask former United States Attorney General, Homer Cummings, to introduce, if introduction be necessary:<sup>5</sup>

"Writer, lecturer, lawyer, teacher of the law, dean of a great law school, creator of a magnificent law center, past president of the American Bar Association, president of the American Judicature Society, chairman and member of innumerable committees for the betterment of procedure and administrative law, leader in rejuvenating the judicial machinery in his home state (New Jersey) and more recently Chief Justice of the Supreme Court of New Jersey. . . . Arthur Vanderbilt has excelled in every field. What he has achieved, by its scope and significance, leaves one a bit breathless."

In his introduction to *Minimum Standards of Judicial Administration*, Judge Vanderbilt speaks of the relatively recent origin of "the impulse for judicial reform" within the American Bar Association and tells of the "the extremely frosty reception" that its annual meeting in St. Paul, Minnesota, in 1906, gave to the brilliant yet matter-of-fact presentation by a young lawyer from Nebraska, Roscoe Pound, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," an address which has since come to be recognized by a younger generation in the law as a classic. "*It should be required reading once a year for every judge, lawyer, law professor, and student on the day he returns from his summer vacation and faces his work anew.*"<sup>6</sup> (Italics supplied)

We of the legal profession are indifferent to its technicalities and delays caused by the niceties of pleading and the refine-

<sup>5</sup>*The Functioning of Judicial Machinery*, J. AM. JUD. Soc'y., April, 1950.

<sup>6</sup>Vanderbilt, Ed., *Minimum Standards of Judicial Administration*, Introduction XVIII and XIX.

ments of procedure. Our substantive law adapts itself to changing economic conditions in which judges, lawyers, and laymen take interest and are usually alert. But when procedural law improvements are broached, interest has been flagging, and changes in the main are resisted. What good to the populace is a substantive law if it cannot be enforced except through archaic legal machinery which, through its anachronisms, delays the day of final judgment? Suitors lose faith in those substantive rights, in courts, and in lawyers, and often seek other means to settle differences, as witness the growing arbitration clauses now so common to contracts.

Some progress in judicial reform has been accomplished largely through the efforts of the American Bar Association and the leadership of former United States Attorney General, Homer Cummings, helped by Judges Vanderbilt, Parker, and others. They accomplished the modern rules of civil and criminal procedure and an efficient administrative establishment to aid our federal courts in a more efficient functioning. "The war in England for procedural reform moreover, was won, not by judges and members of the bar, . . . though a few of the more farseeing and courageous of them furnished the required leadership, but in the main by laymen. Here again we touch another striking paradox of the law. By and large laymen are not dissatisfied with our substantive law, but merely with technicalities of outmoded procedure and the interminable and unjustifiable delays of the law, and, occasionally and unfortunately, with the shortcomings of conscience or of mind or lack of good manners of a judge."<sup>20</sup>

It is then our plain duty to make strong our institutions, and none is more basic and fundamental than our courts. We must engender high respect and esteem in our judiciary. The improvement of judicial procedure is most vital for the defense of our way of life, lest we lose it through apathy and indifference.

*Wake up lawyers and laymen alike* less the insidious forces of a foreign ideology take over, and the Russian goose-step becomes the order of the day! We cannot remain apathetic to the challenge of the hour—*freedom or slavery!* Too many European countries now realize the lateness of the hour and the abjectness into which they have been cast by their lack of vigilance.

The time has now come to remedy the inefficiencies in our

<sup>20</sup>*Supra*, note 9, Introduction XIX and XX.

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court system, the functioning of which causes popular unrest. As stated by Judge Richard Harsthorne:<sup>11</sup>

"Our courts, especially to regulate the life of our people, have in large part maintained the procedures and practices of our forefathers. While justice should be swift, sure and readily available to all, the public frequently criticizes the judicial process as slow, cumbersome and expensive."

The case is well put by Erle Stanley Gardner (creator of Detective Perry Mason):<sup>12</sup>

"People are passionately interested in justice. Lawyers are, for the most part, because of the very nature of their profession, unimaginative. In a vague sort of way they talk about recapturing for the Bar its position of one time leadership, but they lack the vision, the imagination, and the venturesome spirit to know just how to go about doing what they vaguely wish could be done. . . . The opportunities . . . are tremendous. The way is open for us to gain and hold public confidence. *Once we quit thinking about law and begin to think about justice, we see many opportunities—altogether too many.*" (Italics supplied).

The active program for judicial reform was initiated by the American Bar Association under the masterful leadership of Honorable Arthur T. Vanderbilt in 1938, then its president, and most ably assisted by Chief Judge John J. Parker of the United States Court of Appeals for the Fourth Circuit, who was then Chairman of the Section of Judicial Administration.<sup>13</sup> A series of studies and reports on the *minimum* requirements for judicial reform was made by Judge Parker's Section. Distinguished judges, lawyers, and teachers of law participated in the study with the result that there was recommended a total of over sixty specific proposals.<sup>14</sup> The report embraced seven topics: Judicial administration, pretrial procedure, trial practice, trial by jury (including selection of jurors), the law of evidence, appellate practice, and administrative agencies.

The recommendations of the Section of Judicial Administration were adopted and advocated by the House of Delegates

<sup>11</sup>J. AM. JUD. SOC'Y., June 1950.

<sup>12</sup>*Adventures in Justice*, A. B. A. J., Jan. 1951.

<sup>13</sup>63 A.B.A. Rep. 517-529.

<sup>14</sup>*Supra*, note 13, pp. 522-656. See THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Vol. 5, No. 3, March 1950, by Lester E. Denonn. Mr. Denonn's "chart" is ingeniously arranged and compactly informative.

of the American Bar Association in 1938, the program of which was actively sponsored by the Special Committee on Improving the Administration of Justice under the Chairmanship of Judge Parker and by local committees in every state.<sup>15</sup> At the annual meeting of the American Bar Association held in Seattle, Washington, in 1948, the Special Committee was abolished, but with the directive that the objectives be assumed by the local committees in the states under the advice and guidance of the Section of Judicial Administration.

Neither the American Bar Association or the Section desire to interfere in any way with any particular jurisdiction. What the Association does is to furnish information, educational data, publicity, and other aid. The local bar association and state committee decide what reforms are most needed to accomplish a better administration of justice within its own borders. In this alignment, it directly and actively associates itself with the objects and purposes of the American Bar Association and its channeling Section of Judicial Administration. "Much fine and little-heralded work on behalf of procedural reform has been and will be accomplished by these local committees. . . . Reform has always come, must always come, from the students and leaders, *not those whose horizons are limited by their office walls or at most by the walls of the nearest courtroom.*" (Italics supplied).<sup>16</sup>

Our state committee on Improving the Administration of Justice, under the help and guidance of Judge Parker's committee, aided us to promulgate a program for Montana. Several meetings each year were held, at many of which every member of the committee was in attendance. One of such meetings was held in Judge Callaway's office (Helena), when the thermometer registered 30 degrees below zero, and the only absent member was one whose office was only one block from where we convened. Our objectives were: 1. Bar Integration; (every state bordering Montana has integration, but our Montana Supreme Court handed us two black eyes)<sup>17</sup>; 2. Unified Court rules;

<sup>15</sup>The Montana Committee for Improving the Administration of Justice (1939-1948) had the following personnel: Julius J. Wuerthner, Chairman; Hon. L. L. Callaway, Hon. H. Leonard DeKalb, Hon. R. E. McHugh, Arthur F. Lamey, E. J. Toomey, Earle N. Genzberger, H. C. Crippen, \*Walter Aitken (Leader of Bar Integration in Montana). \*deceased.

<sup>16</sup>Clark and Wright, *The Judicial Council and the Rule Making Power: A Dissent and a Protest*, SYRACUSE L. REV. 348 (1950).

<sup>17</sup>In re Unification of Montana Bar Association (1939), 107 Mont. 559, 87 P. (2d) 172. In re Unification of Bar of this Court, 119 Mont. (1947) 494, 175 P. (2d) 773. This later decision contained only 114 words and without a single citation of authority. One of the justices participating therein was strongly supported by the Committee on Bar

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3. Increased salaries for our judiciary; 4. Improvement in the selection and tenure of Judges; 5. A judicial council for Montana. Deplorably, we failed in all these objectives, except increased salaries for judges, and that was accomplished only with the assistance of the Montana Bar Association.<sup>18</sup> Our new committee, under Judge Harold R. Medina's inspired leadership and guidance, hopes to accomplish what the other local committee signally failed in.

In the limited space allotted, one cannot fully exploit the *minimum* standards of judicial administration so "dear to the heart" of Bench and Bar and teachers of law who seek reform and actively work through the American Bar Association, the Section of Judicial Administration, and the local state committees.

## SELECTION AND TENURE OF JUDGES

What is more important than to have a trial judge, able, efficient, and without bias or prejudice to preside over a case? That is what a suitor expects *and is entitled to!* An appellate judge with the same qualifications is also a minimum requirement. In Montana all judges are elected by popular vote on a *non-partisan* basis. Unfortunately, however, instances are known (two within the writer's knowledge) when Montana Supreme Court Judges have delivered partisan speeches, prohibited by the Canons of Judicial Ethics.<sup>19</sup> Judges should not formulate policies. That is a legislative function. They should judicially interpret and determine laws promulgated by legislative enactment.

In 1937 the House of Delegates of the American Bar Association adopted a resolution, ever since adhered to, favoring the filling of vacancies in judicial office by appointment by the executive from a list named by an agency, composed in part "of high judicial officers and in part of other citizens selected for the purpose who hold no other public office." The resolution further stated that: "the appointee after a period of service should be eligible for reappointment periodically thereafter, or

Integration of the Montana Bar Association. In his own handwriting this justice (before he was a justice and during the campaign) voluntarily assured the committee that he was favorably inclined to bar integration in Montana. His election to the Supreme Court was by a very scant majority. He no longer is a member thereof.

<sup>18</sup>Ch. 114, LAWS OF MONTANA 1947, now R.C.M. 1947 § 93-303.

<sup>19</sup>Judicial Canon 28 (Partisan Politics) CANONS OF PROFESSIONAL AND JUDICIAL ETHICS, A.B.A. 1947. "He [the judge] should avoid making political speeches or . . . the public endorsement of candidates for political office and participation in party conventions."



periodically go before the people upon his record with no opposing candidate, the people voting upon the question: 'Shall Judge Blank be retained in office?' " Missouri adopted this plan of selecting judges which has been characterized by the Dallas Morning News (Texas) as "the best court plan in America." It abolishes political elections. The judges are appointed by the Governor from nominees chosen by a group of lawyers and laymen. If the voters approve of him, the judge remains on the Bench. Periodically the judge must run on a "yes" or "no," ballot which is a non-partisan ballot. If a majority votes "no," the judge is removed, and the nominating commission names three, of which the Governor selects and appoints one. The collective opinion of lawyers, laymen, and the judges themselves is that Missouri judges are better than they were before this system of selection was inaugurated. Political pressure has disappeared under this new judicial system as the courts "have been taken completely out of politics and away from the political atmosphere . . . and the public shows a growing tendency to keep judges in office if they have good records."<sup>20</sup>

The late H. C. Crippen of Billings, Montana, past President of the Montana Bar Association, gave much of his time, talent, and money to bring about the improvement in the selection and tenure of our judges, but without success. "There is nothing in the concept of democracy that requires direct intervention by the voters in every aspect of government; and in practice the voter either takes the candidate offered him by the political leaders, or under the direct primary chooses, if he votes at all, on the basis of insufficient knowledge of cheap publicity."<sup>21</sup>

### CONFERENCE OF CHIEF JUSTICES

The first meeting of the Chief Justices of the highest courts of every state in the union was held in St. Louis, Missouri, on September 3, 1949, two days before the opening of the annual meeting of the American Bar Association, and was largely attended. Another highly successful meeting was held in Washington, D. C. in September, 1950, only a few chief justices being absent. These conferences aid in the administration of justice by the exchange of ideas and information as to court procedures, including the recommendations of the Section of Judicial Administration of the American Bar Association.

<sup>20</sup>Hon. Laurence P. Hyde, Chief Justice Missouri Supreme Court. Also see, Hyde, *Judges: Their Selection and Tenure*, 30 J. AM. JUD. Soc'y. 152, 156 (1946).

<sup>21</sup>HANDBOOK: SECTION OF JUDICIAL ADMINISTRATION, p. 78.

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Montana's Chief Justice, Hon. Hugh Adair, attended both conferences, and brought back helpful information and ideas. Evidence of the helpfulness of these conferences was shown when Judge Adair called a conference of all federal judges, state supreme court justices, and district judges on December 16, 1950 at Helena, Montana, where some eight subjects of interest and moment to our judiciary were discussed. A permanent organization known as the Association of State Judges of Montana was formed with Judge William R. Taylor of Deer Lodge County, Montana, as president. Federal Judge W. D. Murray of Butte, Montana, chairman of the committee on selection and tenure of the judiciary, stated that his group is supporting a move to adopt a plan (Missouri) whereby judges would be appointed, and then run on their records and not against opposing candidates. The 1951 legislature will be asked to establish this new method of selecting judges in Montana.

The movement inaugurated by Justice Adair has far-reaching implications, and needs the encouragement of every jurist, lawyer, and layman interested in the improvement of the administration of justice. The conference, now intended to be held annually, should also include the active participation of interested and representative lawyers of Montana, and should be patterned after the judicial conferences held once a year in the several federal circuits consisting of the circuit and district judges of the circuit and bar representatives invited to attend. The Administrative Office Act of 1939 made provision for such conferences.<sup>28</sup> Much good has resulted therefrom. The new Association of State Judges of Montana may finally result in the establishment of a strong judicial council, so many of which are in successful operation in various states.

## COURT ADMINISTRATION

It would be highly desirable if Montana adopted the Model Bill to provide for an administrator for the State Courts such as is provided for in New Jersey where their new constitution provides for the appointment by the Chief Justice of an administrative director to serve at his pleasure. The Administrative Office of the United States has proven its value in the more than a decade of its existence. There should be an administrative head to direct the business of the courts without usurping judicial functions, but to see to it that legal matters be handled with dispatch and in a more efficient manner. Some judges can-

<sup>28</sup>28 U.S.C. §§ 332-333 (1948 Revision).

not keep their dockets current because of congestion, and other judges less involved could be consigned for assistance by a responsible administrator appointed by the highest judicial officer of the state, under whose supervision he would be. This would avoid the delays which characterize some overloaded courts. Such an administrator would aid judges in establishing better business methods. In Montana, as in seventeen jurisdictions, we do not require the collection and compilation of judicial statistics, desirable though they have proven to be.<sup>23</sup>

### PRETRIAL CONFERENCES

The House of Delegates of the American Bar Association in 1938 adopted the recommendation of its Section of Judicial Administration providing for "pretrial hearings" urging that metropolitan areas make provision therefor, and "that other courts should give consideration to the procedure with a view of adopting it if justified by local conditions."<sup>24</sup>

The pretrial conference is held for the purpose of simplifying the issues, allowing pleadings to be amended if necessary, obtaining admission of uncontroverted facts and undisputed documents, restricting within reasonable bounds the number of expert witnesses, and considering the trial of a case to everyone's advantage. It is an outstanding and comparatively recent development to improve trial practice. Many cases have been settled as a result of the pretrial conference.<sup>25</sup> Much deadwood is disposed of and the issues of the case are clarified. Its success depends largely on the attitude of the judge and counsel, and hard work is indispensable. Time spent at a pretrial conference often saves hours of effort at the trial. Pretrial hearings were provided for by Rule 16 of the Federal Rules of Civil Procedure. About 20% of the federal district courts use pretrial in every civil case where issue has been joined and the parties desire a trial. "Many (federal) judges who do not use the procedure regularly still report that they find it exceedingly valuable."<sup>26</sup>

Montana was one of the twenty-nine states which adopted pretrial conference based on Rule 16 of the Federal Rules of Civil Procedure which became effective September 16, 1939.<sup>27</sup> Many leading members of the Montana Bar were of the opinion

<sup>23</sup>*Supra*, note 9, Appendix A at p. 516.

<sup>24</sup>Recommendation II (1) 63 A.B.A. Rep. 523.

<sup>25</sup>*Supra*, note 9 at p. 206.

<sup>26</sup>Report of Pretrial Committee of Judicial Conference of U.S. 1948.

<sup>27</sup>Ch. 61, § 1, LAWS OF MONTANA 1939.

that the statute lacked "teeth" in that pretrial was lodged entirely within the discretion of the judge, and could not be exercised as a matter of right by notice or motion of the litigants. Some progressive-minded district court judges received scant encouragement when pretrial was suggested, and some counsel were rebuffed when the device was sought from judges unwilling to avail themselves of it. In the few centers of Montana where it has been used it has proved successful, particularly in federal courts under Rule 16. Many of the Bench and Bar believe that pretrial is of main benefit to the "Metropolitan Areas," which do not exist in Montana. This, however, is not the fact as evidenced in states with populations approximately the size of Montana.

Montana took a backward step in the improvement of the administration of justice when the 1949 Legislative Assembly repealed pretrial as established in 1939.<sup>28</sup> A district judge in a small, but well publicized county in Montana, was largely responsible therefor. He became so enamored of pretrial that he promulgated a rule to the effect that in the trial on any issue of fact before or by a jury a pretrial conference was mandatory. His "discretion" was exercised in advance of every contested cause before his court, whether or not the circumstances warranted or the suitors were willing to submit to pretrial. Finally, and because of a clogged calendar and a failure to call a jury term, a writ of mandate directed to his court was sought in the Montana Supreme Court.<sup>29</sup> The writ was denied (April 16, 1948) as well as the petition for rehearing (June 11, 1948), the court holding that "the district court has the power to establish by rule a pretrial calendar."

An able and vigorous dissent was written by Mr. Justice Angstman, which contained this statement:<sup>30</sup>

"The main purpose of the rule [formulated by the court] is to make pretrial conference compulsory in each case by denying trial by jury until such conference is had. I do not agree that the court may make a rule making pretrial conference a compulsory proposition and applicable to all cases automatically, in the face of the statute which says that in any action the court may in its discretion order a pretrial conference."

As "*amici curiae*" on the "petition for rehearing only" a

<sup>28</sup>Ch. 84, § 2, LAWS OF MONTANA 1949.

<sup>29</sup>State ex rel. Kennedy v. District Court (1948) 121 Mont. 320, 194 P. (2d) 256.

<sup>30</sup>*Supra*, note 29.

brief was filed containing a statement which, if not ludicrous, at least exposed the ignorance of judicial reform of a majority, if not all, of the seventeen "friends of the court." It is as follows:<sup>29</sup>

"The fair truth about pretrial conferences is that a busy-body committee of the Bar, to exhibit their empty learning got the legislature to import this exotic plant from another soil, and it cannot grow in Montana."

This inapt argument was ably answered by Mr. Justice Gibson:<sup>30</sup>

"As to the paternity of the statute we know not. *Amici curiae* attribute fatherhood to the bar. As to its adaptability to our soil, the soil of Montana is varied; the plant might flourish in one district and wither in another. We find it to be the law. With its wisdom, or lack thereof, the court has naught to say. So many times we have repeated, "With the wisdom of statutes we have no concern; such is for the lawmakers."

Judge Gibson then quoted from the federal case of *Boysell, Co. v. Colonial Coverlet Co.*:<sup>31</sup>

"Experience has shown that, while pretrial procedure generally proves popular with attorneys after they have once become familiar with it, it needs a strong push from the judge to get over the initial bump caused by our acquired habits of thinking of the law as a sort of game in which each party holds his cards under the table."

Pretrial in our state courts should have another "fair trial." It will be one of the hand-maidens of justice and an aid to the federal rule, which "no *amici curiae*" (of Montana) can set aside by legislative act or characterize as an "exotic plant." Montana will make progress in her administration of justice.<sup>32</sup>

## THE LAW OF EVIDENCE

To improve the administration of justice there should be a simplification of the law of evidence. A committee of the Section of Judicial Administration made a careful study of this

<sup>29</sup>*Supra*, note 29.

<sup>30</sup>*Supra*, note 29.

<sup>31</sup>(E. D. Tenn. 1939) 29 F. Supp. 122.

<sup>32</sup>A new book on PRETRIAL (1950) by Harry D. Nims has lately been published under the joint auspices of the Pretrial Committee of the Judicial Conference of the United States and the Council of the Section of Judicial Administration, of the American Bar Association. Mr. Nims has made available to attorneys "the manifold methods and techniques employed by judges who are now successfully using pretrial procedure in various federal and state courts."

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subject, led by the late John H. Wigmore, by common consent the foremost authority of his time on the law of evidence.<sup>35</sup> The committee made several recommendations many of which were adopted by the House of Delegates of the American Bar Association, and some of which were recommended for further study.<sup>36</sup>

Thereafter, the American Law Institute drafted a model code of evidence which adopted a number of these recommendations, and in the compilation of which Mr. Wigmore was chief consultant. The final draft of the Model Code was adopted in 1942.<sup>37</sup>

"The larger part of the law of evidence is basically sound and should be preserved. Much of it is unsound and has outworn its usefulness, if it ever was useful. All of the law of evidence needs clarification and simplification."<sup>38</sup>

"Reform of state evidence law will benefit litigants in federal courts since under the Federal Rules the most liberal rule, state or federal, is to be applied in determining the admissibility of evidence."<sup>39</sup> The Model Code should be adopted in Montana. It will require the consecrated efforts of both Bench and Bar. The Code has brevity—only 116 rules, and covers the entire subject of evidence. Limitations on introduction of evidence of a survivor in an action against the estate of a deceased person are eliminated as recommended by the Section of Judicial Administration.<sup>40</sup> The restriction against impeachment of a litigant's own witness no longer obtains. The Code provides that the privilege of a defendant in a criminal action to refuse to testify shall not be gainsaid him, but that the court and counsel may comment on his failure to do so. The attorney-client, priest-confessor, husband-wife, physician-patient immunities protecting disclosure of confidential communications are preserved with some limitations, but no privilege is accorded social workers, bankers, journalists, or accountants.<sup>41</sup> Hearsay rules are simpli-

<sup>35</sup>Mason Ladd, *Modern Code of Evidence*, JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 12 Revised and reprinted in 27 IOWA L. REVIEW 214 (1942) and in the AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE, p. 329 (1942).

<sup>36</sup>HANDBOOK ON THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE, p. 57.

<sup>37</sup>Recommendation V (4), 63 A.B.A. Rep. 525.

<sup>38</sup>Recommendation V (8), 63 A.B.A. Rep. 525.

<sup>39</sup>Broderick and Broden, *Future of the Model Code of Evidence*, 23 NOTRE DAME LAW 226 (1948). Hale, *Report of the Committee on Administration of Justice on the Model Code of Evidence, A Reply*, 22 CAL. STATE BAR J., 188 (1947). See 27 JOURNAL AM. JUD. Soc'y. 113 (1943).

<sup>40</sup>63 A.B.A. Rep. 525 (5).

<sup>41</sup>*Supra*, note 39.

fied, and a witness may testify as to his personal observations even though it may border on opinion or inference. Montana should undertake a definite program to adopt the rules of evidence as outlined by the Model Code.<sup>42</sup>

### APPELLATE PRACTICE

There is much popular dissatisfaction with our current methods of appellate practice, and we might well heed the recommendations of the Report of the Committee on Simplification and Improvement of Appellate Practice as shown by its report to the Section of Judicial Administration in 1938.<sup>43</sup> Allotted space does not permit a full or adequate exploitation of this important subject. Appellate practice needs reform and simplification. Limitations in the amounts involved on appeal from inferior courts and trial *de novo* should furnish careful study for those interested in judicial reform. Abolition of justice courts and the substitution of small claims courts, presided over by licensed practitioners, would aid in the improvement of justice. Original records, so far as practicable, should be used more commonly in appellate courts. Typewritten records are permissible in the Montana Supreme Court,<sup>44</sup> but by its comparatively recent stricture (April 5, 1949), no typewritten brief, even limited to fifteen pages (old rule), is now permissible.<sup>45</sup> This often leads to a denial of justice. The cost of printing briefs at Great Falls, Montana, is three dollars per page for the first one hundred and thirty pages, and in excess thereof two dollars and ninety cents, and thereafter at graduated cost. The cover and index sheet each cost an additional three dollars. One cannot criticize the printing concerns for this cost when the union scale calls for two dollars and fifty cents per hour for a thirty-seven and one-half-hour week, with overtime of one and one-half to Saturday noon and two times the regular scale thereafter. A rule should be promulgated that no more than a designated number of printed pages of a brief should be taxable as costs.

"One-man" decisions should furnish a topic of study for Bench and Bar. Memorandum opinions, where no new principle of law is involved, would seem to be in order so that the length of decisions may be materially reduced. It would seem desir-

<sup>42</sup>*Supra*, note 39.

<sup>43</sup>63 A.B.A. Rep. 602.

<sup>44</sup>Rule VIII Sec. 1, "Rules of the Supreme Court of the State of Montana."

<sup>45</sup>Rule X, Sec. 1, "Rules of the Supreme Court of the State of Montana."

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able, however, in Montana when an extraordinary writ is applied for and denied by the Supreme Court, that there be more than the usual curt and summary "writ denied" decision given. Reasons for the denial should be supplied for the guidance of litigants.

The limitations of space prevent the discussion herein of such topics as supersedeas bonds, making oral argument more effective, correcting record on appeal, abstracts of the record, presenting records to appellate courts, assignment of errors, review of non-jury cases, etc., but to those whose interest has been stimulated, we commend a careful study of Chapter IX of the *Minimum Standards of Judicial Administration*, so scholarly edited by Chief Justice Vanderbilt of New Jersey.<sup>46</sup>

## SIMPLIFIED PLEADINGS

There is nothing so basic and important to civil procedure reform as the common-sense interpretation by our state courts of pleadings. This is a consummation devoutly to be desired. We seem to be bogged down constantly in a deep morass of shadow-boxing, quibbling and legal folderol. It is becoming increasingly difficult to bring a case to issue. Too many judges encourage technical counsel to expound their tweedle-dees and tweedle-dums. An undotted "i" or an uncrossed "t" causes too great judicial consternation, and *form*, not *substance*, has become the altar of worship. Within the writer's experience, no state district court judge has ever been reversed in the Montana Supreme Court because he denied a motion to strike redundant or irrelevant matter from a pleading. No pleader, young, or even of mature experience, is ever certain whether his client is in court after the initial pleading is filed. He must run the gauntlet of the insidious motions to strike, to make more particular, to separately state, special and general demurrers, etc., so increasingly encouraged by some judges, who fail to observe the trend of the times, or are not mindful of the popular-unrest and general dissatisfaction of suitors with the law's technicalities and unwarranted delays in the administration of justice. If irrelevant or redundant matter is pleaded, it may be excluded by objection at the trial.

No litigant is harmed by its wrongful insertion in a pleading. In many instances, after the motion to strike is lodged and granted, a new pleading is necessary, which, after the statutory period for appearance, is again open to another motion, after

<sup>46</sup>*Supra*, note 9 at pp. 385-453.



which comes the special demurrer and the general demurrer and other dilatory pleas, all designed to postpone the joinder of issue.

Here are a few late examples of successful motions to strike: It was alleged in a personal injury suit that the faulty stairway was used "with *the tacit consent and knowledge* of said defendants." The italicized portion was stricken by the court. In the same cause it was alleged that the "Plaintiff *inadvertently and without fault on his part* slipped and stumbled . . . because of said *faulty*, unfastened and, detached guard rails." The italicized was likewise stricken. After alleging that the area was unlighted "so that the *dangerous and hazardous* condition of said stairway could not be easily observed," the italicized portion was stricken. A city ordinance was pleaded stating that: "and said ordinance was on said date . . . in full force and effect *and provides penalties for violation thereof*, and repeals all other ordinances . . . in conflict thereof." The italicized part of the pleading was stricken on motion. In another case, in describing injuries received by the plaintiff, the words "*residual symptoms*" were employed, which words were stricken on motion because of "indefiniteness." After the complaint was amended and in describing the injuries, the words "*stiffness and weakness of the back*" were used, and again on motion, the court solemnly sustained the motion, and the italicized words were stricken. A special and general demurrer is anticipated and the tweedle-dee and tweedle-dum procedure will gayly continue until the litigant, weary with incessant delays, will form his own judgment of the administration of justice. Every practicing attorney can supply a legion of similar experiences.

The federal rules of civil and criminal procedure offer a beacon of light to the benighted and outmoded state practice. Colorado, under the inspired and brilliant leadership of Phillip S. VanCise,<sup>48</sup> was one of the first states to incorporate the federal rules into its system of jurisprudence and with unquestioned success. Montana might well do likewise.

Under the federal rules, pleadings are construed so as to do substantial justice.<sup>49</sup> "The forms contained in the Appendix of Forms are intended to indicate, subject to the provision of these rules, the simplicity and brevity of statement which the rules contemplate."<sup>50</sup>

<sup>48</sup>Prominent Denver, Colorado, lawyer and author of *FIGHTING THE UNDERWORLD*, (The Riverside Press, Cambridge, Mass.)

<sup>49</sup>Fed. R. Civ. P. 8 (f).

<sup>50</sup>Rule 84, Forms of Civil Procedure.

"Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."<sup>50</sup>

We quote a few statements of Hon. Charles E. Clark:<sup>51</sup>

"A simple system of direct allegation, so successful a feature of the Federal Rules of Civil Procedure, furnishes fully adequate information for the court and litigant without opportunity for quibbling over details. Courts will not long glorify pleading preciseness. And should they appear to do so for any period of time, legislative reform is thereby made surer. Strict pleading produces a reaction, because people will not tolerate the denial of justice for formalities only."

In his monograph, Judge Clark discusses the struggle for procedural reform in England, which was under lay leadership, and which had opposition from the bar. He speaks of the Hilary Rules of 1834 as a "famous example of the evils of special pleading," after which there was a period of "the strictest pleading ever known." Judge Clark then describes Hayes' famous dialogue, *Crogate's Case: A Dialogue in the Shades on Special Pleading Reform*, in which he relates the classic answer of Baron to the question: "But pray how do the suitors like this sort of justice?" "Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adopted to suit the tastes and capacities of the ignorant."<sup>52</sup> Judge Clark recommends "the definite proposal . . . that pleading reformers as a first objective state a series of rules for simple and flexible pleadings, with illustrative forms modeled on the present effective federal system."<sup>53</sup>

<sup>50</sup>Fed. R. Civ. P. 7(e).

<sup>51</sup>U.S. Circuit Judge, 2d Circuit. *Simplified Pleading*, JUDICIAL ADMINISTRATION MONOGRAPHS, Series A.

<sup>52</sup>Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 CAMB. L. J. 261 (1923) showing also the deleterious effects of the rules on substantive law, Cf. Pollock, *THE GENIUS OF THE COMMON LAW* (1912) c III, *Surrebutter Castle 27 et seq.*, referring to "the bastard formalism of pleading" of that time.

<sup>53</sup>Illustration of two federal model forms: (Form 5)

(Caption of Court and parties)

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.

WHEREFORE, etc.

(Form 9) Complaint for negligence.

(Caption of Court and parties)

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boydston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and

# OTHER RECOMMENDATIONS

We have not touched on all of the seven main topics which distinguished committees of judges, lawyers, and teachers of law furnished their reports on, nor is there space to discuss the more than sixty proposals for procedural reform as are sponsored by the Section of Judicial Administration of the American Bar Association and so ably assisted by its various committees.<sup>54</sup>

Trial practice, trial by jury (including selection of jurors), traffic courts, and administrative agencies have not been treated, important though they be in the program of procedural reform in Montana. A judicial council in our state has likewise lacked treatment herein. Sentencing procedures, on which so much could be written, have also been neglected in this article.

Trial practice could likewise form an engaging and most stimulating subject, particularly that portion which advocates the restoration of the common law power of the judge relating to summation, analyzation and comment upon the evidence.<sup>55</sup>

The topic of trial by jury, which includes more intelligent juror selection, needs attention by interested students of judicial reform. Selection of jurors by commissioners would be a step in the right direction towards the improvement in the administration of justice. The Cleveland system might well form the subject of considered study and analysis.<sup>56</sup>

The improvement of our traffic courts or trial courts of limited jurisdiction has furnished a subject which has had serious attention by the Section of Judicial Administration of the American Bar Association.<sup>57</sup> This study favors abolition of justice of peace courts, substituting therefor city courts with enlarged territorial jurisdiction, having experienced judges with a legal background and a thoroughly organized office personnel. The local state committee of the Junior Bar Conference has made valuable contributions in its sponsorship of state wide conferences on traffic courts.

Administrative procedure and the improvement of administrative tribunals, including judicial review, could well furnish ex-

was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

WHEREFORE, etc.

<sup>54</sup>63 A.B.A. Rep. pp. 522-656.

<sup>55</sup>Recommendation III (1). 63 A.B.A. Rep. 523.

<sup>56</sup>*Supra*, note 40.

<sup>57</sup>Vanderbilt Ed., *Minimum Standards of Judicial Administration* app. A, P. 510.

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tended discussion were space not limited. The Committee on Administrative Agencies and Tribunals made recommendations which chart a course of action and procedure that all interested in the advancement of justice should study.<sup>68</sup>

## CONCLUSION

This article barely has scratched the surface of the judicial reform that we would wish to see inaugurated in Montana. There is yet time for improvement in our system of judicature. "Too little and too late" is not yet our fate, although it is "getting later than we think." Much remains to be done. We are riding on the tide of reform. Hon. Arthur T. Vanderbilt recently stated:<sup>69</sup>

"More has been accomplished in this country in the last quarter century to improve the administration of justice than in the preceding 250 years."

I conclude with Judge John J. Parker's brilliant summary on Improving the Administration of Justice:<sup>70</sup>

"But there is a higher ground upon which I would base my appeal. If democracy is to live, democracy must be made efficient; for the survival of the fit is as much a law of political economy as it is of the life of the jungle. If we would preserve free government in America, we must make free government, good government. Nowhere does government touch the life of the people more intimately than in the administration of justice; and nowhere is it more important that the governing process be shot through with efficiency and common sense. We lawyers must help in every way that we can to meet the force of totalitarian states and to refuse the slavish philosophy on which they are founded; but nothing else that we can possibly do or say is so important as the way in which we administer justice. The courts are the one institution of democracy which has been intrusted in a peculiar way to our keeping."

<sup>68</sup>64 A.B.A. Rep. 407.

<sup>69</sup>Case and Comment, Jan. and Feb., 1951.

<sup>70</sup>27 A.B. J. 71 (1941).

Judge Parker is Chief Judge, U.S. Court of Appeals for the Fourth Circuit; alternate U.S. Judge at Nuernberg trials, a member of the Council of the Section of Judicial Administration, and for many years the chairman of the A.B.A. Committee on Improving the Administration of Justice.